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Jose Manuel Alvarez Zarate

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THE *IN DUBIO PRO DEVELOPMENT* PRINCIPLE: A RIGHT TO DEVELOPMENT IN TRADE AND INVESTMENT REGIMES

JOSÉ MANUEL ÁLVAREZ ZÁRATE*

I. INTRODUCTION

It is important to recall that the current International Economic Law (“IEL”) regime has been construed considering the ideas and promises of growth and economic development for all, including developing countries, as states are bound by such promises allegedly made in good faith.¹ The liberal interpretation that progressive liberalization of access to goods, services and capital, on one hand, whilst denying access to knowledge and technology, on the other²—absorbed into the interpretation of IEL rules by investment arbitrators and trade panels—may no longer deny the IEL foundational Right to Develop (“RTD”) and its corollary principle *in dubio pro development*. The former interpretation may reduce the policy space³ for developing countries to adopt developmental policies though their local regulation.⁴

There are at least three scenarios in which the adoption of developmental policies may have interpretative problems: (i) in the political discussion, when countries negotiate and discuss the construction of or changes to the economic system and the models of investment and trade regimes; (ii) in the process of

* *Dr. José Manuel Álvarez Zárate is a Professor of International Economic Law at the Externado University of Colombia. He also works as a sole practitioner in trade and investment areas involving to local regulation. Many thanks to Markus Wagner for his helpful criticism and suggestions and to Daniel García and María Angélica Prada, for excellent research assistance in the process of writing this paper. The usual disclaimer applies.

1. Such promises can be found in the negotiating agendas, preambles, and rules of trade and investment treaties. For some approaches to the RTD in trade and investment, see Constantine Michalopoulos, *Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries*, working draft, (World Bank working draft, 2000); U.N. Conference on Trade and Development, Geneva, Switz., June 2000, *International Investment Agreements: Flexibility for Development*, UNCTAD/ITE/IIT/18 (2000).

2. In the age of information and in a technological society, access to knowledge is a mandatory requisite for acquiring development. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains advanced requisites for access to knowledge and technology and no mandatory provisions for providing the transfer of technology to countries; therefore, the way in which this agreement was written limits access to knowledge instead of liberalizing it, unlike GATT and GATS do for goods and services respectively. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

3. U.N. Conference on Trade and Development, Trade and Development Report, *Global Governance and Policy Space for Development*, UNCTAD/TDR/2014 (2014) [hereinafter *Global Governance*].

4. For investment rules, see Lise Johnson & Oleksandr Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law*, 1:5 INVESTMENT TREATY NEWS, 3, 3 (2014).

applying the rules by interpreting them when countries need to pursue their economic interests, by enacting policies for their own economic development; and (iii) before dispute settlement mechanisms, such as trade panels or investment tribunals.⁵

The above merits an economic-political debate and a legal discussion; this paper will focus on the latter. There is a huge amount of academic literature in the field of law and development⁶ that supports the economic-political discussion and helps us understand the strategic importance of development for emerging nations and its relationship to trade and investment rules. However, this paper will mainly focus on the legal aspects in the adoption of developmental policies by emerging nations, as the arguments pleaded above and made by an IEL dispute settlement body must be free from political considerations.⁷ The IEL rules on investment and trade, currently in force in many states, are part of the mandatory international rule of law for states. Therefore, these rules and their interpretation are shaping states' development ideals and have important consequences when international economic obligations are assessed, both in trade and investment disciplines, at the point in which they collide with the RTD.⁸ As Markus Wagner points out, "international trade and investment law can offer valuable insights for one another;" both systems are apparently "twins separated at birth" and are thus sufficiently similar enough to warrant a meaningful comparison,⁹ which justifies the inclusion of both regimes in

5. Sonia E. Rolland does a good job at explaining these three concerns for trade in her book. See SONIA E. ROLLAND, *DEVELOPMENT AT THE WTO* (2012) [hereinafter ROLLAND, *DEVELOPMENT*].

6. See David Trubek, *Toward a Social Theory of Law: an Essay on the Study of Law and Development*, 82 YALE L.J. 1, 10 (1972). See also DAVID M. TRUBEK, *Introduction* to DAVID M. TRUBEK, *LAW, STATE AND DEVELOPMENT IN LATIN AMERICA: CASE STUDIES* 1-16 (Trubek, Alviar, Coutinho & Santos, eds.), https://media.law.wisc.edu/s/c_638/g2y2j/lands_book_intro_final.pdf; David Kennedy, *Laws and Developments*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 17-26 (John Hatchard & Amanda Perry-Kessaris eds. 2003) ("The idea that building 'the rule of law' might *itself* be a development strategy instead encourages the hope that choosing law could substitute for the perplexing political and economic choices which have been at the centre of development policy-making for half a century. The legal regime offers an arena to contest those choices, but it cannot substitute for them. The hope that it might encourages people to settle on the particular choices embedded in one legal regime as if they were the only alternative."); Laura Victoria García Matamoros, *El derecho del desarrollo como base para la construcción del derecho al desarrollo*, INT'L L.: REV. DE COLOMB. DERECHO INT., 235-72 (2007); DONATELLA ALESSANDRINI, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADE REGIME: THE FAILURE AND PROMISE OF THE WTO'S DEVELOPMENT MISSION* (2010).

7. As for investment treaty arbitration, as Susan Franck claims, systemic bias against developing countries is unacceptable and shows that the outcomes on cases do not show any bias by arbitrators. See Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. J. 435, 437 (2009) [hereinafter Franck, *Development and Outcomes*]. On the contrary, the quantitative empirical methodologies are to be taken with care, as there is a lack of data included on some studies, and the consistency of it needs to be clear as information about what was extracted or missing needs to be available to readers. See Gus Van Harten, *Fairness and Independence in Investment Arbitration: A Critique of "Development and Outcomes of Investment Treaty Arbitration,"* INVESTMENT TREATY NEWS (Dec. 16, 2010), www.iisd.org/itm/tag/arbitrator-independence.

8. See *Global Governance*, *supra* note 3, at 1.

9. See Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 10 (2014)..

this paper, and suggests that the RTD and the *in dubio pro development* follow the same conditions in both regimes.

The question of the existence of a right for nations to develop in trade and investment agreements is crucial and controversial, particularly when assessing some of the economic consequences of those agreements for developing nations,¹⁰ and when developing countries must regulate for economic developmental purposes. The RTD, as revealed in this paper, would grant broader policy space in limited cases to developing countries.¹¹ It is not intended, however, that developing countries would have unlimited policy space, as that would undermine the trade and investment systems.¹²

Liberal theories, which do not recognize the RTD, apply to when developing countries rely on their own efforts to mobilize productive resources and to raise their levels of domestic investment, human capital, and know-how.¹³ However, for this, they must have the widest possible room available to maneuver and determine which policies work in their particular conditions, and not be subjected to a constant shrinking of their policy space by IEL institutions originally established to support more balanced and inclusive outcomes,¹⁴ where indeed the RTD was recognized.

The RTD looks as if it is circumscribed to political discourse. It is not, as shown by its recognition in soft-law instruments such as declarations¹⁵ and U.N. General Assembly resolutions,¹⁶ or as hard-law in human rights treaties, which recognize development as inextricably linked to economic, social and political rights.¹⁷ Nevertheless, in treaty practice, development seems to have been neglected to the point where it has become a non-enforceable right. While it is customarily established in treaty preambles, the right to development has received little practical application by states and dispute settlement bodies when such

10. See ROLLAND, *DEVELOPMENT*, *supra* note 5, at 2. This paper will take the same approach mentioned by Sonia Rolland which goes beyond the protectionism versus openness debate, where the issue goes to development policies and to what has been called "policy space" to describe the range of domestic economic and industrial policies, which would be WTO compatible. JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 13-24 (2011).

11. Notwithstanding that from a legal perspective the RTD raises questions as to defining development and the nature or content of such a right, here an approach is attempted in order to open a wider debate arguing that the RTD has legal status in the IEL system.

12. See Wagner, *supra* note 9.

13. *Global Governance*, *supra* note 3, at I.

14. *Id.* at I-II.

15. See U.N. ESCOR, *Comm. on Hum. Rts.*, Rep. on its 33rd Sess., Feb. 14, 1977, U.N. Doc. E/CN.4/S.R.1389 (Feb. 14, 1977).

16. See G.A. Res. 41/128, *Declaration on the Right to Development*, U.N. Doc. A/RES/41/128 (Dec. 4, 1987).

17. For an overview of the discussion, see Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425 (2000); James Thuo Gathii, *The Right to Development, Human Rights and Economic Partnership Agreements*, in *REALIZING THE RIGHT TO DEVELOPMENT* 259 (2013); Diane A. Desierto, *Development as an International Right: Investment in the New Trade-Based IAs*, 3 TRADE L. & DEV. 296 (2011).

entities are enforcing international economic obligations.¹⁸ Academics have also neglected the RTD discussion, with some ignoring the legal perspective of developing countries, whittling it down to an ideological position¹⁹ or deeming it an unenforceable right before dispute settlement bodies.²⁰ However, a few well-founded exceptions, where development concerns are seen as a right, have reluctantly arisen.²¹ The disdain for the RTD has driven some investment arbitrators to interpret the opposite of the *in dubio pro development*, i.e. when in doubt, treaty obligations are meant to protect the rights of the investor and not the state's rights.²²

II. IS DEVELOPMENT AN ECONOMIC ISSUE, AN ISSUE OF LAW, OR BOTH?

A. *Development as a Right of the State*

This paper does not seek to address an issue that is common in academic research on this topic, which is whether the RTD is a human right and as such, how difficult it may be to enforce this right before an international tribunal.²³ Hence, for the purposes of this work, the RTD is not understood exclusively as a human right but as a state's economic right that is embedded in trade and investment treaties. Scholars have recognized the significant problems presented by analyzing the RTD from a human rights perspective for its recognition in trade and investment treaties.²⁴ It may be problematic to use a human rights perspective in an IEL case, as, due to the fragmentation of international law, a dilemma of systemic application and interpretation of law will ultimately be faced.²⁵ However, applying the RTD directly to an IEL case, as an obligation embedded in the

18. A good example can be seen when developing countries are implementing a panel or appellate body report as "they may face specific challenges due to their socioeconomic vulnerabilities or costs associated with implementation." Sonia E. Rolland, *Considering Development in the Implementation of Panel and Appellate Body Reports*, 4 TRADE L. & DEV. 150, 150 (2012) [hereinafter Rolland, *Considering Development*].

19. RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 14 (2008).

20. Alvarez, *supra* note 10, at 95-99.

21. In the case of trade, the RTD has had some policy space. See Rolland, *Considering Development*, *supra* note 18. Towards IIAs, the RTD matters have been left as a "jurisdictional gatekeeping." See Desierto, *supra* note 17, at 296.

22. See *Pro investment cases like Société Generale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). Van Harten, *infra* note 123, showed 140 cases on legal issues on jurisdiction, that tend to be issues for which the text of an investment treaty is ambiguous or silent, leading to disagreements about the appropriate approach. Expansive resolutions of an issue may be said to favor claimants by expanding the authority of investment treaty tribunals and by allowing more claimants to proceed. In general, seventy-six percent of the decisions were expansive investor-friendly against twenty-three percent for state.

23. See Bunn, *supra* note 17 at 1427.

24. ROLLAND, DEVELOPMENT, *supra* note 5 at 28 (doubts that the RTD has not gained legal status and "has not percolated to the WTO").

25. Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 58th Sess., July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (2006).

system, eliminates the need for that discussion.

In human rights discourse, it has been argued that even if the RTD exists, governments of developing states owe it to their own populations, and thus is not owed by foreign developed countries. This situation is not within the scope of this paper. Nevertheless, assuming that such a claim is correct, it would not serve as an argument against the use proposed for the RTD – in fact, it is an argument that would strengthen its use in trade and investment cases. If developing states have the international duty to grant and guarantee the RTD as a human right of their inhabitants, they must not be placed in a position in which they must decide whether to fulfill such developmental expectations or to be subject to claims because a trade partner or an investor may challenge the country's measures implemented for development purposes.

Thus, as will later be discussed, the RTD can be understood and identified from within IEL's system, without direct recourse to human rights treaties. If the rules and principles that grant the RTD can be found within the IEL system, and thus can be applied directly in a trade or investment case, one does not need to search for such a right in another international treaty. Therefore, this paper calls for states and adjudicators to reinterpret trade and investment treaties²⁶ as developmental language can already be found there.

Another recurrent objection to the enforceability of the RTD is the non-justiciability of the issues to which it may give rise.²⁷ Some scholars have concluded that the RTD is non-justiciable under international law.²⁸ This paper proposes a different approach. If IEL adjudicators were given broad discretion in deciding commonly understood trade and investment disputes as well as the power to determine their jurisdiction and merits, adjudicators would then have also the ability to decide on matters applying the *in dubio pro development* principle.

For these reasons, this paper proposes to overcome such a dilemma by acknowledging that a claim against a developed country before an international dispute resolution mechanism is not a prerequisite for recognition of the RTD. Rather, just as defendants may plead certain affirmative defenses in municipal law when sued in local courts, a developing country may employ the RTD and *in dubio pro development* principle as a defense in an IEL case. By recognizing that states enjoy a right not to be declared responsible for breaching IEL obligations when pursuing development-related goals, a state's RTD can be given normative value within the IEL system.

26. As proposed by LISE JOHNSON & MERIM RAZBAEVA, STATE CONTROL OVER INTERPRETATION OF INVESTMENT TREATIES 1 (2014). States could be more active in interpreting the investment treaties as "a relatively efficient tool to achieve the objectives of adding clarity to and reducing exposure under existing treaties." *Id.*

27. Desierto, *supra* note 17, at 316-19.

28. See Rolland, *Considering Development*, *supra* note 18.

B. What Kind of Economic Development Must International Economic Law Confront?

Before tackling issues of development, one must first be able to define the concept. Scholars and international institutions have attempted to define development in a variety of ways.²⁹ Questions arise about whether it should only encompass economic growth as seen in some trade and investment treaties,³⁰ or whether other factors must be analyzed when determining what contributes to a country's development. Moreover, it is vital to determine which developmental policies are in conformity with international obligations. Although its meaning is deeply influenced by economic and political theories, this issue has legal consequences, as it is important to clarify what amount of policy space is needed to pursue development goals, taking into account the RTD and the *in dubio pro development* principle.

A more comprehensive understanding of development, one that recognizes economic growth as intrinsically tied to areas of environmental sustainability; food security; the reduction of extreme poverty, hunger, and child mortality; access to health; the promotion of education and gender equality,³¹ would give an idea of how much policy space development requires in order to be fully achieved. This definition closely coincides with the legal one given by the Andean Tribunal to international development and human rights instruments.³²

The prior definition recognizes that whilst economic growth is fundamental, it is insufficient, and development as a concept must encompass a more wholesome set of elements that guarantee the well-being of a state's inhabitants. Hence, for the purposes of this paper, development-related measures will be seen as those that a government adopts in order to foster economic growth through supporting economic strategic areas and that promote the well-being of its inhabitants through access to education, food security, healthcare or environmental protection.

IEL must confront the question of development in the academic arena and in practice when states are drawing up specific policies to foster development and throughout international dispute settlements. The question of determining the margin of appreciation granted to governments in order to adopt public policies that foster development for their nations arises when IEL imposes international obligations upon states, both in Trade and Investment disciplines. National

29. ROLLAND, DEVELOPMENT, *supra* note 5, at 15, compiles a comprehensive overview from the evolution, trends, and different perspectives from scholars and institutions and recognizes that "[t]he particular processes of economic growth, industrialization, and the expansion of social and political opportunities become encapsulated in the term 'development.'"

30. The discussions have not been concentrated upon the economic growth measures, but upon the myth of its desired consequences, which has left several serious problems unattended, including social inclusion, alleviation of poverty, and the general wellbeing of the majority of people.

31. See *Global Governance*, *supra* note 3 at II (citing Henry Morgenthau, who insisted that, "Prosperity like peace is indivisible. We cannot afford to have it scattered here or there among the fortunate or to enjoy it at the expense of others. Poverty, wherever it exists, is menacing to us all and undermines the well-being of each of us.").

32. See *infra* notes 97 and 98.

development strategies that comprise all of the above will need to be accompanied by regulatory changes;³³ therefore it is likely that states or investors would challenge some of those regulations. Throughout the last decade, the rise in investment disputes has posed this question and, even though in the trade discipline the question could be considered less controversial, it persists nevertheless.³⁴

IEL rules are drafted differently in the case of investment and trade, which lead to different interpretations in each case. For investment rules, they are drafted in such a way that their meaning is often broadly worded; while in the case of trade rules, the undertakings are more detailed. Thus, interpretation is crucial for determining the precise extent to which a state is responsible for a breach of an international obligation, or whether its behavior was sanctioned by international law. With regards to the scope of development, no single route may be used. On the one hand, regional trade agreements (“RTAs”) among developing countries frame development as a core issue. The inclusion of asymmetric provisions to support the less industrialized Member States is one way to recognize that the relationship between trade liberalization and development³⁵ is not limited to growth. Conversely, the scope of developing provisions in RTAs among developing and developed countries may be narrower.

Yet, as “development rights” language is included in treaties, the interpreter is required to give extent and meaning to the definition; thus new arguments must be made by parties, advocates, and arbitrators, to incorporate economic reasoning, development facts, and available data into the term’s meaning. Determining the appropriate definition and extent of development is not an easy job, but it is important that such an endeavor be carried out in order to avoid relying on fabrications and myth.³⁶

III. THE RIGHT TO DEVELOPMENT IN TRADE AND INVESTMENT REGIMES

The RTD is not a right ruled by the principle “first in time, first in right.”³⁷

33. See *Global Governance*, *supra* note 3 at VII.

34. The persistent push for a more universal, transformative, and sustainable approach to development will play a key role in the setting of new goals and targets for policymakers, in addition to its moral implications, growing inequality causes seriously damage to social well-being, threatens economic progress and stability, and undermines political cohesion. See *Global Governance*, *supra* note 3, at VI.

35. See ROLLAND, *DEVELOPMENT*, *supra* note 5, at 57-58.

36. Different economic approaches can be used to determine the extent of development, but any one used must rely on data and the nature of the policy and or measures, not on myths. Many myths had been construed against developing countries, i.e. that to developing countries the *pacta sunt servanda* principle did not have any meaningful force. As Jason Jackee pointed out and successfully demonstrates: “that, contrary to the myth, a long line of international jurisprudence demonstrates that state promises to foreign investors have been strongly presumptively enforceable as a matter of consistent international law and practice.” See Jason Webb Jackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 *FORDHAM INT’L L.J.* 1550, 1551 (2008).

37. A principle of law which holds that the first person to pose or use a right has the right to use it

States that had precedence in time and had acquired economic development first indeed had the advantage with regards to the RTD, but just because such states obtained full power over economic development does not mean they can later bar economically underdeveloped nations from employing the RTD. The RTD is recognized in multiple international instruments and by trade and investment treaties for developing countries, as will be discussed later.

The promises of growth and development for all must not be forgotten when interpreting trade treaties; as such promises achieved legal status when their words were included in different international agreements. As Jason Jackee points out,³⁸ just as the law protects promises made to investors, so too must it enforce promises to developing countries.

In 1986, in the context of settling the agenda for the Uruguay Round, developing countries accepted the inclusion of three “new trade issues,” – namely services; intellectual property; and investment – in negotiations, in exchange for development and growth. There was a compromise by the United States and other countries to include the development issue in favor of developing countries, in exchange for the inclusion of the three ‘new issues’ within the negotiating mandate.³⁹ As a result, the RTD was construed as a foundational value of international economic trade treaties as it is imbued with commonly shared transcendental and democratic values.⁴⁰ Accordingly, growth and development in developing countries is a goal that the IEL system must always strive to attain. The RTD is an implicit value of the IEL system because its rules have been teleologically formulated by a language impregnated with commonly shared values that were formulated when negotiating agenda objectives and treaty preambles.⁴¹ These values later served to inspire the rules of the legal system by which such treaties must abide.

As the *in dubio pro development* principle is implicit in trade and investment law and has emerged from the systemic integration of treaty preambles, Special and Differential Treatment (“SDT”) rules and negotiation purposes⁴² have the

in the future over the right of later users. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 881 (2000).

38. See Jackee, *supra* note 36, at 1150, 1154.

39. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terence P. Stewart ed., 1993).

40. See Markus Wagner, *Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law*, 20 CARDOZO J. INT'L & COMP. L. 713, 718 (2012). Wagner addresses the Appellate Body of the WTO use of values in interpreting IEL norms in the *Brazil-Retreated Tyres*: “A panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness.” *Id.* at 732.

41. See *Global Governance*, *supra* note 3, at II (stating “Pursuing bold international collective action to correct the deep inequities of the world, along with determined and innovative domestic policy initiatives, was what motivated the participants at Bretton Woods 70 years ago and in Geneva 50 years ago.”).

42. For a deduction of principles in law, see Acosta Alvarado & Paola Andrea, *The General Principles of Law and Principle Type Rules: Its Conceptualization and Use in International Law*, 25

power to bind treaty parties.⁴³

Sufficient elements to support *opinio juris* that an RTD and its correlative *in dubio pro development* principle exists in International Economic Law include: the constant incorporation of development language into IEL treaty preambles as a goal; the express acknowledgement of the non-violating nature of subsidies; and health measures that protect the environment.

Therefore, as democratically agreed upon principles on their own constitute an autonomous formal source of international law and are not necessarily subsumed under custom or treaties, panelist and arbitrators interpreting the RTD and the *in dubio pro development* principle in a case must give it proper consideration.⁴⁴

The *in dubio pro development* principle also manifests itself in the presumption of conformity with development-related measures. In conjunction with the *bona fide* principle, it is to be presumed that states act in conformity with their international obligations,⁴⁵ such that when a state adopts a measure that seeks

REV. DERECHO DEL ESTADO, 193, 193-219 (2010).

43. See Wagner, *supra* note 9, at 43 (citing Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL L.J. 198, 202 (2002) on the shared values of investment and trade regimes: “those charged with interpreting and applying treaties on the protection of foreign investment need to take into account the values that are reflected in norms that have arisen outside the context of the investment treaty which they are applying.”).

44. As for the importance of principles as an international law source in case law, see *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 142-43 (Apr. 20) (separate opinion by J. Antonio Cancado Trindade).

45. See Appellate Body Report, *US—Continued Suspension of Obligations in the EC - Hormones Dispute*, ¶ 315, WT/DS320/AB/R (adopted Nov. 14, 2008); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 315, WT/DS321/AB/R (adopted Nov. 14, 2008) (“The Member required to implement the DSB’s recommendations and rulings may be presumed to have acted in good faith when adopting the implementing measure.”). As for investment, see *Saluka Invs. BV (Neth.) v. Czech* ¶¶ 255, 259-60, 262-63 (Perm. Ct. Arb. 2006).

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare. . . . The Tribunal further recalls that, in an accompanying note to the 1967 OECD Draft Convention on the Protection of Foreign Property, it is provided that measures taken in the pursuit of a State’s ‘political, social or economic ends’ do not constitute compensable expropriation Similarly, the United States Third Restatement of the Law of Foreign Relations in 1987 includes *bona fide* regulations and “other action of the kind that is commonly accepted as within the police power of State” in the list of permissible—that is, non-compensable—regulatory actions In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, “[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required” That being said, international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, non-

to bolster development, it must be deemed *prima facie* as in conformity with its international obligations.⁴⁶ In this way, the challenge to an IEL obligation to such measures should be assessed under a higher standard than challenges to measures seeking other ends. In principle, it is not meant to be an irrefutable rule, as a claimant may successfully prove that even when a government has adopted a pro-development measure, it has been adopted beyond its limits.⁴⁷

A. *The Right to Development in Trade*

Since the origins of the General Agreement on Tariffs and Trade ("GATT"), the IEL regime held the idea that progressive liberalization of access to goods will lead the world to progress and improved welfare.⁴⁸ The same idea lay behind the system for services and capital, after the Uruguay Round.⁴⁹ As seen before, the increase in trade, welfare and growth was one of the justifications for the intellectual property protection contained in TRIPS. However, the agreement was written in a way that allowed for no liberalization and limited access to knowledge and technology.⁵⁰

Based on these hypotheses, interpreters including governments, arbitrators, and trade panels, have considered, with some disdain, the application of RTD to

compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.

Id.

46. Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 278, WT/DS231/AB/R (adopted Oct. 23, 2002) ("We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.").

47. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 296-98, WT/DS217/AB/R, WT/DS234/AB/R (adopted Jan. 27, 2003).

Article 26 of the *Vienna Convention*, entitled *Pacta Sunt Servanda*, to which several appellees referred in their submissions, provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The United States itself affirmed "that WTO Members must uphold their obligations under the covered agreements in good faith"... Clearly, therefore, there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith. Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.

Id.

48. See the GATT preamble which establishes that: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods." General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 154 [hereinafter GATT].

49. *Id.*

50. See TRIPS, *supra* note 2.

the political trade sphere or to dispute mechanisms.⁵¹ As mentioned before, this is due to the misguided belief that such a right is not a part of the IEL system and therefore, it is unenforceable.

Growth and development initiatives were on the minds of trade negotiators hailing from 96 countries at the Punta del Este Declaration Ministerial on September 20, 1986, when the Uruguay Round of GATT Negotiations was launched. As a result, they are repeatedly mentioned in several sections of the Declaration.⁵² For example, Part I establishes that the removal of trade distortions, protectionism, the preservation of GATT's basic principles and the development of a more open, viable, and durable multilateral trading system would promote both growth and development.⁵³ It also states that the negotiations should benefit all countries, especially the less developed contracting parties; that the principle of differential and more favorable treatment embodied in Part IV of GATT and in the decision of November 28, 1979, would apply to the negotiations; and additionally, that developed countries did not expect reciprocity for their commitments made in trade negotiations to reduce or remove tariffs and other barriers to the trade by developing countries.⁵⁴

Part II of the Ministerial Declaration of Punta del Este provides that as a result of service-based negotiations the parties "shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries."⁵⁵

For purposes of this paper, the RTD can be recognized in two different ways: (i) as a special exception to the right of access to trade, the Fair and Equitable Treatment ("FET"), and indirect expropriation standards, or (ii) as an autonomous rule, which must be applied as a *lex specialis* rule to the trade and investment norm.

Some maintain regional and free trade agreements ("FTAs") as well as international investment agreements ("IIAs") reduce policy space and "that regardless of the countries involved, by signing those agreements developing-country governments relinquish some of the policy space they have been endeavoring so hard to preserve at the multilateral level."⁵⁶ Notwithstanding, customary international law suggests otherwise, while preambles, rights and obligations of RTAs and IIAs signed after 2004 have all recognized the RTD in

51. See Rolland, *Considering Development*, *supra* note 18; see also Phillip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, (July 2, 2013), 6 ICSID Rep. 14 (2013).

52. Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, GATT B.I.S.D. (33d Supp.), at 19 (1987) [hereinafter Punta del Este Declaration].

53. *Id.* at Part I.

54. *Id.*

55. *Id.* at Part II. See also, ALESSANDRINI, *supra* note 6, at 91.

56. See *Global Governance*, *supra* note 3 at X.

one form or another, given the revival of the important role of industrial policy and the failure of free market policies.⁵⁷

One FTA objective is the promotion of development for its states' parties, as the language used in the treaties makes clear reference to it. Most FTAs refer to development in their preambles or in the text of the treaties. However, there is not a single model wording. References to development range from a brief mention in the preamble to a very detailed clause or article on development objectives. For example, most FTAs between Canada and other countries include a number of references to development in the preamble, such as the promotion of sustainable development; broad-based economic development in order to reduce poverty, while recognizing the differences in the level of development and the size of the Parties' economies; and the importance of creating opportunities for economic development.⁵⁸

Other treaties, like the ones signed between the United States and Colombia and the United States and Peru, refer in their preambles to the promotion of a "broad-based economic development," the reduction of poverty, the protection of the environment and the promotion of sustainable development.⁵⁹ Treaties signed by the European Union ("EU") contain more comprehensive clauses regarding the concept and outcomes of development. For instance, the FTA between the EU and Central American States ("CA") includes considerations in its preamble acknowledging the difference in economic and social development existing between the CA countries and the EU.⁶⁰ The preamble also recognizes the "shared

57. States have begun to add new wording to development related treaties in the last decade thereby allocating some policy space to implement developmental policies. This has produced an emerging *opinio juris* that recognizes the RTD as an IEL rule, which is being crystalized by its constant inclusion in treaties.

58. Free Trade Agreement between Canada and the Republic of Colombia, Can.-Colom., Nov. 21, 2008, 2011 Can. T.S. No. 11.

59. See Preamble,

PROMOTE broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;...IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters.

United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, State Dep't No. 06-128. See also, Preamble,

PROMOTE broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;...IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters.

U.S.-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, T.I.A.S. 06-226.

60. See Preamble,

HIGHLIGHTING their commitment to working together in pursuit of the objectives of poverty eradication, job creation, equitable and sustainable development, including aspects of vulnerability to natural disasters, environmental conservation and protection and biodiversity, and the progressive integration of the Republics of the CA Party into the world economy;... CONSIDERING the difference in economic and social development existing

objective of strengthening the process of economic and social development in Central America,” and states that the “agreement will create a climate conducive to growth in sustainable economic relations between them [the two regions], more particularly in the trade and investment sectors which are essential to the realisation of the economic and social development and technological innovation and modernisation.”⁶¹ The two regions were aware of the need to promote sustainable development and reaffirmed their sovereignty to exploit their natural resources, according to their own environmental and developmental policies to promote sustainable development.⁶²

Similarly, the FTA between the EU, Colombia, and Peru includes comprehensive references to development objectives in its preamble which expresses a desire “to promote comprehensive economic development with the objective of reducing poverty and creating new employment opportunities and improved working conditions, as well as raising living standards in their respective territories by liberalising and expanding trade and investment between their territories.”⁶³ Furthermore, the reference to development is also expressly contained in a provision that enumerates the objectives of the agreement.⁶⁴ The parties are also “COMMITTED to implementing this Agreement in accordance with the objective of sustainable development, including, the promotion of economic progress, the respect for labor rights and the protection of the environment, in accordance with the international commitments adopted by the Parties.”⁶⁵ Moreover, the difference in economic and social development between the signatory Andean Countries and the EU and its Member States were considered.⁶⁶ Beyond the preamble, Article 4, which addresses the agreement’s objectives, states the promotion of trade should be conducted “in a way that contributes to the objective of sustainable development, and [] work in order to integrate and reflect this objective in the Parties’ trade relations.”⁶⁷

RTAs in Latin America have also recognized the RTDs of its members. For example, Articles 1 and 2 of the Cartagena Agreement,⁶⁸ a founding treaty for the Andean Community, to which Colombia, Bolivia, Ecuador and Peru are parties, promotes as its two main objectives a balanced, harmonious, and equitable

between the Republics of the CA Party and the EU Party and the shared objective of strengthening the process of economic and social development in Central America.

Agreement Establishing an Association Between Central America, on the one hand, and the European Union and its Member States, on the other, June 29, 2012, 2012 O.J. (L 346).

61. *Id.*

62. *Id.*

63. Trade Agreement between the European Union and its Member States, on the one part, and Colombia and Peru, on the other part, preamble, May 31, 2012, 2012 O.J. (L 354) 55.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at art. 4(j).

68. Andean Subregional Integration Agreement, May 26, 1969, art. 1, http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=393 [hereinafter Cartagena Agreement] (founding the Andean Community).

development of the Member Countries and an improved standard of living for the sub-region's population.⁶⁹ There are several other provisions in the agreement which favor development, such as Article 108, which considers the different stages of development of the member states; Article 109, which stipulates a special regime for Bolivia and Ecuador that grants them greater participation in order to gradually diminish their development disparities with other Member States.⁷⁰ The Andean States have likewise agreed to act jointly before any international organization in order to receive the technical assistance and project financing required for Ecuador and Bolivia's development.⁷¹

This Andean Pact also provides flexibility to Bolivia and Ecuador to improve their possibilities for development and participation in the Andean Community's industrialization process⁷² and allows for the Agreement's Andean Community Commission to establish better conditions in favor of those countries, than those initially contemplated in the Agreement.⁷³

B. *The Right to Development in Investment*

An increasing number of countries include specific language in the preamble to their IIAs aimed at making clear that the objective that investment must not be pursued at the expense of other key public policy goals, such as the protection of health, safety, or environment.⁷⁴

Contrary to the WTO-regime or the rules on trade contained in FTAs, IIAs

69. *Id.*

70. *Id.* at art. 109 ("Bolivia and Ecuador shall enjoy a special regime, with a view toward gradually reducing the differences in development that currently exist in the subregion. This system shall enable them to attain more rapid economic growth through effective and immediate participation in the benefits of the area's industrialization and the liberalization of trade.").

71. *Id.* at art. 118.

The Member Countries commit themselves to act jointly to secure technical assistance and financing for Bolivia and Ecuador's development needs, particularly for projects related to the integration process, from the Andean Development Corporation and any other subregional, national, or international organizations. The resources for those projects shall be allocated in accordance with the basic objective of reducing the existing differences in development among the countries by making an attempt to favor Bolivia and Ecuador markedly. The Member Countries, moreover, shall jointly request the Andean Development Corporation to allocate its regular and special resources in such a way that Bolivia and Ecuador are given a substantially larger share than they would receive if the distribution were to be proportional to their contribution to the Corporation's capital.

Id. (emphasis added).

72. *Id.* at art. 119 ("In its periodic evaluations and annual reports, the General Secretariat shall give separate and special consideration to Bolivia and Ecuador's situation in the subregional integration effort and shall propose to the Commission the measures that it deems appropriate to substantially improve their possibilities for development and increasingly expedite their participation in the area's industrialization.") (emphasis added).

73. *Id.* at art. 120 ("The Commission may establish, for the benefit of any of the relatively less developed countries, more favorable conditions and procedures than those considered in this Chapter, in the light of the degree of development attained and the conditions for taking advantage of the benefits of integration.") (emphasis added).

74. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 190 (3d ed. 2010).

normally do not have a general exceptions clause equivalent to GATT's Articles XX or XVIII. Notwithstanding, some treaties are now including these GATT-style general exception clauses.⁷⁵ The general approach given by scholars has been to analyze non-precluded measures ("NPM") clauses commonly found in bilateral investment treaties ("BITs"), such as those ratified by the United States, Germany, the Belgian-Luxembourg Economic Union, Canada, and India.⁷⁶ NPM clauses contain specific exceptions for security, public order, taxation, and more recently, environmental protection issues.

Canada is one of the countries that have started to include general exceptions in some of its investment agreements. For example, Article 10 of its 2004 Model BIT includes a general exception for: (i) the protection of human, animal, or plant life or health; (ii) to ensure compliance with laws and regulations that are not inconsistent with the Agreement; and (iii) the conservation of living or non-living exhaustible natural resources.⁷⁷ BIT Models from the United States,⁷⁸ Colombia,⁷⁹ France,⁸⁰ Germany,⁸¹ and Norway⁸² fail to incorporate any general exception clauses, but do include NPM clauses.

A new trend among IIAs is the insertion of "Not Lowering Standard" clauses, which recognize that parties to the treaty should not encourage investment by relaxing domestic health, safety, or environmental measures or core labor standards.⁸³ The 2004 Canadian Model BIT contains the following clause:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention

75. UNCTAD Secretariat, *International Investment Rulemaking*, ¶ 34, U.N. Doc. TD/B/COM.2/EM.21/2 (22 May 2007), http://unctad.org/en/Docs/c2em21d2_en.pdf; see also ANDREW NEWCOMBE, *General Exceptions in International Investment Agreements*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351 (Marie-Claire Cordonnier Segger, et al. eds., 2011) (indicating that by 2008 from more than 2800 IIAs, only a handful of 25 or 30 contained GATT like general exceptions).

76. William W. Burke-White & Andreas Von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 318 (2008).

77. Canada Model Agreement for the Promotion and Protection of Investments, art. 10, 2004, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> [hereinafter *Canada 2004 Model BIT*].

78. 2012 U.S. Model Bilateral Investment Treaty, art. 8(3), 2012, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

79. Columbian Model Bilateral Agreement for the Promotion and Protection of Investments, art. viii, 2007, http://italaw.com/documents/inv_model_bit_colombia.pdf.

80. France Draft Bilateral Agreement on the Reciprocal Promotion and Protection of Investments, 2006, <http://italaw.com/documents/ModelTreatyFrance2006.pdf>.

81. German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments, 2008, <http://www.italaw.com/sites/default/files/archive/ita1025.pdf>.

82. Norway Draft Bilateral Agreement for the Promotion and Protection of Investments, 2007, <http://www.italaw.com/sites/default/files/archive/ita1031.pdf> [hereinafter *Norway 2007 Model BIT*].

83. *Id.* at art. 11.

in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.⁸⁴

However, these types of clauses do not have as their objective to encourage development in the receiving state, the concern that belies them is the elimination of the "rise to the bottom practice," which has allowed countries to compete for investment by reducing or eliminating core health, environmental, or labor regulations.⁸⁵

Although the inclusion of environmental principles has not been widely accepted by investment tribunals, some cases have shown the importance of these principles for the interpretation of treaty obligations. For example, in the NAFTA/UNCITRAL case *SD Myers v. Canada*, the tribunal recognized that when interpreting the treaty's content several principles that emerged from its context should be taken into account, among them, that "environmental protection and economic development can and should be mutually supportive."⁸⁶ In the subsequent case of *Parkerings-Compagniet AS v. Republic of Lithuania*, the tribunal interpreted the "like circumstances" standard to include some considerations on environmental protection, such as requirements set by the UNESCO World Heritage Center.⁸⁷

The *in dubio pro development* principle and the RTD need to be applied at the moment of interpreting the content of states' obligations toward foreign investors,⁸⁸ as part of IEL, i.e. international investment law. Principle and right can be extracted from the text of the IIAs. Most IIAs include language in their preamble that recognizes development as one of the investment regime's main objectives. For example, the United States' IIAs recognize that "treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties."⁸⁹

84. *Canada 2004 Model BIT* *supra* note 77, at art. 11.

85. JOSÉ MANUEL ÁLVAREZ ZÁRATE, *ALCA Y TLC CON ESTADOS UNIDOS: LA AGENDA DE NEGOCIACIÓN SUS COSTOS Y BENEFICIOS FRENTE A LOS INTERESES NACIONALES* 257 (2004).

86. *S.D. Myers, Inc. v. Can.*, UNCITRAL Arb., Partial Award, ¶ 247 (Nov. 13, 2000), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/dispatch/myers-18.pdf>.

87. *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶ 381 (Sep. 11, 2007).

88. Omar E. García-Bolivar, *Defining an ICSID Investment: Why Economic Development Should be the Core Element*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 13, 2012) <https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/>.

89. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, T.I.A.S. No. 06-1101, <http://www.state.gov/documents/organization/56650.pdf>; *see also* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Azer., Aug. 1, 1997, S. TREATY DOC. NO. 106-47 (2000), <http://2001-2009.state.gov/documents/organization/43478.pdf>; Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Bangl., Mar. 12, 1986, S. TREATY DOC. NO. 99-23

Furthermore, more recent IIAs include clauses that require the investment to be made in compliance with the laws and regulations of the state. Although the wording of these clauses can differ in each treaty, their purpose is to prevent the protection of investments that have been made in violation of the host country's laws or policies toward the development of a specific economic sector.⁹⁰ These clauses may be found in several IIAs, for example, in the treaties ratified between Spain and several Latin American countries.⁹¹

IV. TREATY OBLIGATIONS AND THE *IN DUBIO PRO DEVELOPMENT* PRINCIPLE

Development is commonly expressed as a goal and an important value in several instruments, as mentioned earlier. The question of finding a normative value for development in treaties, where this goal is not mentioned throughout a treaty text, would initially hinder development-related considerations when applying the treaty. Yet, development oriented interpretations could diverge among different trade panels and investment tribunals, but mostly among trade and investment systems. As Markus Wagner indicates,

Divergence in interpreting different treaty language is certainly not a new phenomenon... However, the potential of the two dispute settlement systems deciding that countries have divergent regulatory space—especially when it concerns a challenge to the same governmental measure—has the potential to severely undermine the predictability for governments to regulate...⁹² upon development policies.

There is not a single answer as to what extent the RTD and the *in dubio pro development* principle may reach because much would depend on treaty language.

A. *The Trade Regime and the RTD*

The World Trade Organization (“WTO”) regime’s preamble has a clear development goal and several rules on agreements that confirm such goals, such as Special and Differentiated Treatment (“SDT”).⁹³ The SDT is a set of GATT provisions designed to give special treatment to developing countries when

(1986), http://www.sice.oas.org/Investment/BITSbyCountry/BITs/US_Bangladesh_e.asp; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, US-Hond., July 1, 1995, S. TREATY DOC. NO. 106-27, (2000), http://www.sice.oas.org/Investment/BITSbyCountry/BITs/US_Honduras_e.asp.

90. Salini Costruttori S.P.A. & Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 46 (Jul. 23, 2001), 42 ILM 609 (2003) [hereinafter “Salini v. Morocco”].

91. Acuerdo entre el Reino de España y la República de Colombia para la Promoción y Protección Recíproca de Inversiones, Colom.-Spain, Mar. 31, 2005, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/COL_Spain_s.pdf; Acuerdo para la Promoción y Protección Recíproca de Inversiones, Ecuador-Spain, Jun. 26, 1996, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/ECU_Spain_s.pdf; Acuerdo para la Promoción y Protección Recíproca de Inversiones, Mex-Spain, Oct. 10, 2006, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Spain_s.asp.

92. Wagner, *supra* note 9, at 9-10

93. See ROLLAND, DEVELOPMENT, *supra* note 5, at 192-193.

participating in the international trade of their domestic products.⁹⁴ The underlying idea was that these economies would eventually develop through the promotion and strengthening of trade. Unfortunately this idea failed to come to fruition, as was expected by an array of emerging nations.

The RTD has been clearly recognized in IEL treaty practice and case law in Latin America, as seen in the Andean Community's economic integration agreement. The Andean Community Court of Justice (*Tribunal de Justicia de la Comunidad Andina*, in Spanish, or "TJCA")⁹⁵ specified that the RTD was established in Articles 1 and 2 of the Cartagena Agreement, the founding treaty of the Andean Community, which establishes as the main objective of the Community the promotion of a balanced, harmonious, and equitable development of the Member Countries, and the improvement of the standard of living of the sub-region's population.⁹⁶ Through its case law, the Court has developed and applied the RTD, which has spilled over into the interpretation and application of all rules in the sub-regional legal system.⁹⁷ Therefore, any rule contained in the legal system of the Andean Community should be interpreted in a way that guarantees the enduring improvement in the standard of living of the population. For example, the right to development in the TJCA should be broadly interpreted, as a country's development should be aimed at meeting the fundamental needs of its people through economic and social integration, the acceleration of growth, the generation of employment, the participation in the process of regional integration, and the equitable distribution of the benefits of this process among Member States.⁹⁸ Through the application of this principle, the Court interpreted and limited the rights and obligations of the states in order to protect fundamental collective rights recognized under the sub-regional legal system, such as the right to education, health, a healthy environment and the right of indigenous people to prior consultation;⁹⁹ as the TJCA has recognized the link with human rights

94. *Id.* at 110.

95. The Court of Justice for the Andean Community [hereinafter T.J.C.A.] is the dispute settlement mechanism of the Andean Community, created in 1979 by the Treaty Creating the Court of Justice of the Cartagena Agreement (amended by the Cochabamba Protocol). The object of the Court is to interpret, enforce and settle disputes between its four Members States: Colombia, Peru, Bolivia and Ecuador. *See generally*, Cartagena Agreement, *supra* note 68.

96. *Id.* at art 1; *see e.g.*, T.J.C.A., Proceso 137-IP-2003 (Mar. 10, 2004), intranet.comunidadandina.org/Documentos/Procesos/137-IP-2003.doc [hereinafter Proceso 137-IP-2003].

97. *See*, Proceso 137-IP-2003, *supra* note 96.

98. *Id.* at 7 (The original text reads: "En este marco, se concibe el desarrollo de los Países Miembros como un proceso dirigido a procurar la satisfacción de las necesidades fundamentales de sus habitantes, mediante la integración y la cooperación económica y social, la aceleración del crecimiento, la generación de ocupación y la participación en el proceso de integración regional. Además, de conformidad con el artículo 2 del Acuerdo, el desarrollo debe conducir a una distribución equitativa de los beneficios de la integración entre los Países Miembros, de modo de reducir sus diferencias.").

99. T.J.C.A., Proceso 60-IP-2012 (Oct. 24, 2012), <http://intranet.comunidadandina.org/Documentos/Procesos/60-IP-2012.doc> (protecting the right of indigenous people in Colombia to prior consultation in cases where someone is using the community's traditional knowledge. In doing so, the Tribunal stated:

treaties.¹⁰⁰

B. *The Investment Regime and the RTD*

1. ICSID Convention

The relationship between development and the International Centre for Settlement of Investment Disputes (“ICSID”) convention has been a subject of thorough academic discussion, mostly through a “jurisdictional gate keeping,”¹⁰¹ but it would exceed the scope of this paper to address such an issue. Rather than focusing on whether investment contributes to development, this work draws attention to the policy space an investment host country has in order to pursue developmental measures.

Notwithstanding that the discussion here is different, the *Salini*¹⁰² criteria does have valuable legal merit. Some lines may be devoted to the existence of an investment in order to apply the standards of the IIA to such and its contribution to development. The *Salini* criteria consider the importance of development and conclude that the investment should contribute to the economic development of the host state.¹⁰³ After *Salini*, the question has fallen to unsettled discussions considering that tribunals are reticent to recognize the development criteria as they usually assume that investment *per se* contributes to the development of host states.

The Community’s rules on industrial property must be in accordance and harmony with the protection of human rights, as these are the cornerstone for the performance of all sub-legal operators. It is not possible understand that then Community’s IP standard recedes from said protection, especially if the fundamental basis of the process of integration is the inhabitant of the sub-region (paragraph 3 of Article 1 of the Cartagena Agreement). Based on this considerations Article 3 of Decision 486 of the Andes Community Commission was issued, aiming to strike a balance between the industrial property rights and the rights of indigenous peoples and communities.

(translation by the author)); T.J.C.A., Proceso 107-IP-2008 (Feb. 4, 2009), intranet.comunidadandina.org/Documentos/Procesos/107-IP-2008.doc (establishing that the Community’s regulation on trade secrets should always be interpreted in the light of the limits imposed by collective rights of a fundamental character) (translation by the author); T.J.C.A., Proceso 110-IP-2007 (Dec. 4, 2007), intranet.comunidadandina.org/Documentos/Procesos/110-IP-2007.doc (establishing that copyright is not absolute because they should be interpreted in the light of their social function, which includes considerations on the right to information, access to knowledge, and education) (translation by the author); T.J.C.A., Proceso 114-IP-2009 (Apr. 29, 2010), intranet.comunidadandina.org/Documentos/Procesos/114-IP-2009.doc [hereinafter Proceso 114-IP-2009] (establishing that any rule under Decision 436 (regarding phytosanitary measures) should take into account the protection of the life, health and a safety environment) (translation by the author).

100. See, Proceso 114-IP-2009, *supra* note 99, ¶ 23-24; T.J.C.A., Proceso 43-IP-2014 ¶ 53 (Jun. 10, 2014), intranet.comunidadandina.org/Documentos/Procesos/43-IP-2014.doc.

101. See generally, *Desierto*, *supra* note 17, at 296.

102. A body of ICSID case law, which has developed around the meaning of “investment,” has come to be known as the “*Salini* test.” “*Salini v. Morocco*,” *supra* note 90, ¶52. The four elements of the *Salini* test are: (i) a contribution in money or other assets; (ii) a certain duration; (iii) an element of risk; and (iv) a contribution to the host State’s economy.

103. *Id.*

This position, which could be true in most cases, should not be considered as an absolute truth or a rule, because it appears subjective when tribunals do not review empirical data or economic evidence to support such a claim.¹⁰⁴ Indeed it is a rebuttable premise, especially when a respondent state provides evidence demonstrating that investment does not contribute to development but in return has a higher social cost to the host country.¹⁰⁵ As far as arbitral practice is concerned, arbitrators tend to assume that the development-requirement criterion within the *Salini* test is usually subsumed by the criteria of assumption of risk, investment duration, and capital commitment;¹⁰⁶ nevertheless, arbitrators have not affirmed this is always the case, leaving the door open for further discussion. Arbitrators have reacted, without much analysis or empirical evidence, to respondent states that claim that the investor did not contribute to the state's development.¹⁰⁷ Supporting decisions based on assumptions of development, without first assessing economic facts or empirical work in a case, justifies the investment system's critiques of arbitrators' subjectivity.¹⁰⁸ Julie Maupin provides important reasons for looking at empirical scholarship, which can enhance the pool of information available to influence "neutrals," (i.e., arbitrators), and can help debunk myths and challenge assumptions, as arbitrators may take "into account empirical evidence on the operation of the IIL system when steering tribunals and drafting awards."¹⁰⁹

A regrettable example of the above is the tribunal's decision on jurisdiction in *Philip Morris v. Uruguay*,¹¹⁰ which ignored the respondent's argument regarding the claimant's contribution to Uruguay's economy in comparison with the social and economic cost it represents. It was an argument cleverly constructed by Uruguay in order to discuss whether these sorts of investments are indeed contributing to a host state's development.¹¹¹ Unfortunately, as Julie Maupin points out about what empirical studies cannot do, "if . . . detailed case studies do

104. Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 768, 795 (2008) [hereinafter Franck, *Empiricism and International Law*]; Dr. Julie Maupin, *Empirics and Opposition: What Empirical Studies Can (and Can't) Do for International Investment Law Scholarship* (Apr. 27-28, 2012) (unpublished manuscript) (on file with author) (Dr. Julie Maupin was a presenter the London School of Economics Workshop on the Political Economy of Investment Treaties).

105. See *Philip Morris Brands Sári, Philip Morris Products S.A. & Abal Hermanos S.A. v. Uru.*, ICSID Case No. ARB/10/7 (July 2, 2013) [hereinafter "*Philip Morris v. Uruguay*"] (where Philip Morris brought a claim against Uruguay for implementing tobacco regulations for the purpose of improving public health).

106. *Salini v. Morocco*, *supra* note 92, ¶52.

107. Whenever Tribunals decide on development issues they should rely more on economic data and empirical evidence when assessing such matters. Regarding what empirical scholarship methodologies can do for investment arbitration see Franck, *Empiricism and International Law*, *supra* note 104, at 795 ("Investment treaty dispute resolution could obtain useful information by using different research methodologies (whether they be quantitative, qualitative, or mixed methods) to evaluate key questions"); see also, Maupin *supra* note 104.

108. See Franck, *Development and Outcomes*, *supra* note 7, at 453.

109. Maupin, *supra* note 104, at 5-6.

110. "*Philip Morris v. Uruguay*," *supra* note 105.

111. *Id.* ¶176-82.

not convince a non-believer that international investment disputes sometimes do impact the public interest, then it is unlikely that an empirical demonstration of the same phenomenon will do so."¹¹²

This paper does not attempt to analyze in depth the negotiation history of the ICSID Convention; but this example does show that the Centre was created as the result of a compromise between investment-exporting and investment-receiving nations, the latter comprising the bulk of nations which would eventually demand recognition of their RTD and the application of the *in dubio pro development* principle. It has been understood that behind the creation of the ICSID there was a "grand-bargain,"¹¹³ which can be simplified as the acceptance of international arbitration by developing nations, considering the influx of investment that would eventually develop their economies.¹¹⁴

In this way, acknowledging that not all economic activities contribute to the development of host states, and as such they could be refused access to the Centre, would create a standard that would be in accordance with the original compromise upon which the ICSID was created. On the one hand, states would still have a chance to show that certain economic activities are not worth being protected through ICSID arbitration, due to the fact that the social and economic burden of hosting such investment nullifies its development-related rewards.¹¹⁵ On the other hand, investors would not have to prove such a contribution to development every time they attempt to access ICSID arbitration, which seems to be the situation that has given rise to the controversy in this regard.¹¹⁶

Finally, as for the merits, the RTD and its corollary *in dubio pro development* principle, play an important role in knowing the limits of states to enact developmental policies armored against investor challenges. The definition of development would become crucial, but, as Diane Desierto discovered, none of the 31 tribunals reviewed indicated a workable definition of the RTD¹¹⁷ and neither of the economic definitions have helped to reach a unified meaning.¹¹⁸

Nevertheless, the ICSID Convention preamble clearly recognizes "the need for international cooperation for economic development, and the role of private international investment therein"¹¹⁹

Therefore, it is inconceivable to uphold the belief that if a developing country needs to improve reasonable development conditions, it should be restrained. On the contrary, as established in the preamble, it can be interpreted that the ICSID Convention states that cooperative means among countries and investors shall

112. Maupin, *supra* note 104, at 7.

113. Desierto, *supra* note 17, at 298.

114. *Id.*

115. See, e.g., "Philip Morris v. Uruguay," *supra* note 105, ¶176-82 (arguing that the "investment" of Philip Morris hinders development).

116. Desierto, *supra* note 17, at 299.

117. *Id.* at 301, 332.

118. ROLLAND, Development, *supra* note 5, at 24-28.

119. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Preamble, Mar. 18 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

foster economic development. This is because it is inherent to international cooperation that all actors – states and investors – make efforts to achieve the development purpose, as there is a natural balance between investment protection and economic development. On a case-by-case basis, the policy space to achieve development may be reduced if measures are unexpected, arbitrary, or odiously discriminatory. Arbitrators were given wide discretion to decide on such issues.¹²⁰ The myth that IIAs are inclined to protect investors and not safeguard the wellbeing and interest of a state's inhabitants must be better evaluated. Arbitrators need to keep in mind that the IIAs were not intended to be hostile to states and that the adjudicative system was based on values and principles of legality, fairness, and neutrality. Therefore, arbitrators must be cautious regarding an expansive interpretation that is unsympathetic to an investor's host countries. As Gus Van Harten remarks, "the interpretation and application of the law should reflect a degree of evenness between claimants and respondent States in the resolution of contentious legal issues arising from ambiguous treaty texts and should be free from significant variation based on claimant nationality."¹²¹

As many cases are brought to the ICSID through IIAs, the RTD will likely be made clearer as the new generations of IIAs are provided with more RTD-related language.

2. The IIAs

Development of the Parties is a common term that can be observed in several IIAs, especially in FTAs and trade co-operation agreements where such undertakings are included in the agreement.¹²² Nevertheless, the extent to which it is normative is still disputed, perhaps due to the disdain of tribunals.¹²³ It should be noted that when the development language is enshrined in an IIA, the RTD has legal space to be operationalized because the negotiators had the intention of giving effect to such language.¹²⁴

120. See Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361, 411 (2013).

121. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211, 214-216 (2012) ("Two significant tendencies were observed. The first was a strong tendency toward expansive resolutions that enhanced the compensatory promise of the system for claimants and, in turn, the risk of liability for respondent states. The second was an accentuated tendency toward expansive resolutions where the claimant was from a Western capital exporting state.").

122. Desierto, *supra* note 17, at 323-324 (pointing out that regional trade cooperation agreements by developing countries respond to development concerns in the context of investment protection, like in the Investment Agreement on the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area, the 2009 ASEAN (Association of southeast Asian Nations) Comprehensive Investment Agreement, and the 2009 ASEAN-China Investment Agreement).

123. See "Philip Morris v. Uruguay," *supra* note 105.

124. The process of negotiating any treaty is long and difficult for the public officials involved. Every word and obligation of the treaty is carefully studied, as it is well known that an effect will be given afterwards. Therefore, if the term "development" is included in a legal instrument such as an IIA, a legal effect must be given to it, as the principle of useful effect must be applied when the countries enact pro developmental policies. The useful effect principle has been recognized in IEL. MARION

The main question is whether the adoption of public policies to foster development may be considered a breach of IIA-derived obligations.

Most cases in investment law dealing with these questions have taken the perspective of justifying the state's conduct. Usually states have defended themselves from IIA claims under limited exception clauses in their respective IIAs.¹²⁵ This perspective creates a problematic situation when dealing with justification or exceptions where one has already determined that a breach of an obligation has occurred.

If IIA obligations such as Fair and Equitable Treatment ("FET") are interpreted with a development-related focus, no violation of such an obligation may occur when the measure in question is development-related. The adoption of a measure that would, for example, foster the economic advancement of marginalized populations or general measures that protect the environment or public health, would have to be considered within the state's regulatory autonomy of what is fair and equitable.

While investment law was originally a protection against abusive behaviors by host states, it has turned out to be an external instance of the judicial review of governmental policies, which may have been found to be legal even by their internal review procedures.¹²⁶

Thus, the standard of review of what is fair and equitable must be flexible depending on the nature of the developmental measure in question and the interpretation of this treaty-derived obligation must not only be understood in the literal sense of the terms *fair* and *equitable*. In the case of development-related measures, FET must be interpreted under the *Neer* standard: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."¹²⁷ This approach is consistent with the application of the *in dubio pro development* principle; the adoption of these measures must be presumed as conforming to the IIA, as part of a state's legitimate regulatory powers.¹²⁸ Thus, a claimant must prove that there was a gross violation to due process, legitimate expectations, impartiality, and non-discrimination in order to show the existence of a breach of such an obligation.¹²⁹

The fact that the adoption of pro-development measures is understood not to

PANIZZON, GOOD FAITH IN THE WTO JURISPRUDENCE: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT 123 (2006).

125. NEWCOMBE, *supra* note 75, at 6.

126. See Johnson & Volkov, *supra* note 120, at 380.

127. *Neer v. United Mexican States*, IV R. INT'L ARB. AWARDS 60, 61-62 (Gen. Claims Comm'n (U.S.-Mex.) 1926) http://legal.un.org/riaa/cases/vol_IV/60-66.pdf.

128. The legitimate regulatory powers that a state still holds and that are not limited by the IIAs, as provided by the *Neer* standard. *Id.*

129. The *Neer* standard should apply to developmental policies, otherwise the *in dubio pro development* principle would be violated.

breach an obligation is fundamental.¹³⁰ When addressing justifications of IIA-breaches, tribunals tend to differ regarding issues such as the self-judging nature of an exception, or whether the justification regime within the IIA is self-contained, or is to be interpreted under the necessity standard.¹³¹

These discussions have resulted in technicalities that lead to tribunals failing to find states "justified" and thus responsible for the breach of an international economic obligation.¹³² This situation is incongruent, both with the harmonic interpretation of IIAs and the *in dubio pro development* principle. It is inconceivable that states have been granted an RTD, but are deprived of the means to achieve such a goal.

V. CONCLUSION

In conclusion, the RTD and the *in dubio pro development* principle are legally binding within the IEL system as they are founding doctrines of a legal system that inspired development-like language in international trade and investment treaties at the World Trade Organization; FTAs and IIAs signed among developed states and emerging national economies. Some critiques may arise, but they will be similar to the criticisms given to various awards and scholarly literature on this matter that had advanced on the development of principles and rules derived from the treaties.

Arbitrators or panelists may decide whether or not to apply the RTD and the *in dubio pro development* principle in an IEL case, but they cannot completely deny their existence in trade and investment treaties, as such panelists and arbitrators have had created other principles and rules the same way as suggested in this paper.

130. If the RTD and the *in dubio pro development* principle are not recognized as legal binding obligations contained in the IIAs, countries in their process to develop may not take developmental policies, as they would be fatally sued before an international body of arbitrators.

131. Julie Bédard, et. al, *New ICSID Annulment Decision Exposes Possible Gap in United States Investment Treaty Protection*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (July 19, 2010), <http://www.skadden.com/insights/new-icsid-annulment-decision-exposes-possible-gap-united-states-investment-treaty-protection>.

132. *Id.*